

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY
AND THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Rules of the
Minnesota Pollution Control Agency and
the Minnesota Department of Health
Governing Water and Wastewater
Treatment Certification

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Pollution Control Agency and the Minnesota Department of Health (Department or Agency) are seeking review and approval of the above-entitled rules, which were adopted by the agencies without a hearing. Review and approval is governed by Minn. Stat. § 14.26 (2010). On May 8, 2012, the Office of Administrative Hearings received the documents that must be filed under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2011). Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The following provision of the adopted rules is **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, item D: rule part 9400.1500, subp. 1. All other parts of the rule are approved.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review

Dated: May 22, 2012

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. When a rule grants undue discretion to the agency, the rule must be disapproved.¹

In the present rulemaking process, the Administrative Law Judge has found one defect in the rules that can be easily cured. All other rule parts are approved.

Minn. R. 9400.1500, subp. 1.

The agency proposes to delete language providing that a conditional certificate “must be issued” upon application and proposes to replace it with the following sentence:

The operator of a system or facility that is reclassified to a higher class pursuant to part 9400.0600 **may** be issued a conditional certificate in the higher class that is effective for three years from the date of issue when the following conditions are met:

- A. The operator is a current operator with direct responsibility;
- B. The operator has worked as the operator with direct responsibility at the same system or facility a minimum of 12 consecutive months prior to application for the conditional certificate; and
- C. The applicant passes all exams required for the higher class in sequence (D, C, B, and A) and prior to startup of any system or facility upgrades that are related to the change in class.

(Emphasis added).

As written, the rule part is unduly vague and grants the Commissioners undue discretion in that it merely gives the Commissioners the option of issuing the conditional certificate if the conditions are met, and regulated parties have no way of knowing under what circumstances the Commissioners will or will not issue the conditional certificate when the conditions are met. The wording is also inconsistent with Minn. Stat. § 115.75, subd. 1, which provides that a certificate “shall” be issued to water supply system operators and wastewater treatment facility operators who meet the requirements of adopted rules. To correct the defect, the Administrative Law Judge recommends that the word “may” be replaced with the word “must” or “shall” so that it is clear to regulated parties that the conditional certificate will be issued when all the conditions are met. Changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and would not make the rule part substantially different than the rule as originally proposed.

K. D. S.

¹ Minn. R. 1400.2100, item D.